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# Supreme Court of the United States

**OCTOBER TERM, 1961**

**No. 581**

**AN-SON OFFSHORE DRILLING COMPANY,**
**Petitioner**

**against**

**TEXAS SAN JUAN OIL CORPORATION,**
**Respondent**

**PETITION FOR CERTIORARI TO THE COURT OF APPEALS FOR THE SECOND CIRCUIT**

---

**No.**

**AN-SON OFFSHORE DRILLING COMPANY,**
**Petitioner**

**against**

**HONORABLE RICHARD H. LEVET, UNITED STATES DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF NEW YORK,**
**Respondent**

**MOTION FOR LEAVE TO FILE PETITION FOR MANDAMUS OR PROHIBITION; AND PETITION FOR MANDAMUS OR PROHIBITION**

*Eberhard P. Deutsch,*
Hibernia Bank Building,
New Orleans 12,
Attorney for Petitioner.

*Deutsch, Kerrigan & Stiles,*
*Malcolm W. Monroe,*
*Burlingham, Underwood, Barron, Wright and White,*
*Eugene Underwood,*
Of Counsel.

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**SUPREME COURT OF THE UNITED STATES**

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**MOTION FOR LEAVE TO FILE PETITION FOR MANDAMUS OR PROHIBITION; AND PETITION FOR MANDAMUS OR PROHIBITION**

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**MOTION FOR LEAVE TO FILE PETITION FOR MANDAMUS OR PROHIBITION**

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Petitioner moves the Court for leave to file, under 28 USC 1651, the annexed petition for writs of mandamus

or prohibition; and moves that an order and rule be entered and issued, directing the Honorable Richard H. Levet, Judge of the United States District Court for the Southern District of New York, to show cause why writs of mandamus or prohibition should not be issued against him in accordance with the prayer of said petition, and why petitioner should not have such other and further relief in the premises as may be just and meet.

*Eberhard P. Deutsch,*
1800 Hibernia Bank Building,
New Orleans 12,
Attorney for Petitioner.

*Deutsch, Kerrigan & Stiles,*
*Malcolm W. Monroe,*
*Burlingham, Underwood, Barron,*
*Wright and White,*
*Eugene Underwood,*
Of Counsel.

November 29, 1961

## PETITION FOR CERTIORARI TO THE COURT OF APPEALS FOR THE SECOND CIRCUIT, AND FOR MANDAMUS OR PROHIBITION TO THE DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

Petitioner seeks *certiorari* to review an order of the Court of Appeals for the Second Circuit, denying petitioner's petition for writs of mandamus or prohibition to the Honorable Richard H. Levet, United States District Judge for the Southern District of New York; and petitioner also seeks writs of mandamus or prohibition to require the District Court to vacate its order entered on September 8, 1961, and to order transfer of this civil action, and the pendant arbitration, to the Eastern District of Louisiana.

### OPINIONS BELOW and JURISDICTION

The opinion of the District Court, which has not yet been reported, is printed in the appendix hereto.

The Court of Appeals rendered its order, without written opinion, on October 30, 1961.

Jurisdiction of this Court lies under 28 USC 1254 and 1651.

### QUESTION PRESENTED

The novel and important question of federal statutory construction presented for review is:

> Are a civil action to compel arbitration, and the pendant arbitration itself, subject to transfer

to a more convenient forum pursuant to 28 USC 1404a, the transfer-of-venue statute?

The negative answer in this case by the District Court, in which the Court of Appeals tacitly concurred when it denied petitioner's petition for writs, is the first decision on the issue directly in point; but the holding conflicts in principle with decisions by this Court, to the effect that all prior venue provisions are subject to the overriding considerations of 28 USC 1404a, which was adopted "without hint that some (types of actions) should be excluded". *Ex parte Collett*, 337 US 55 (1949); *Kilpatrick vs Texas & Pacific R. Co.*, 337 US 75 (1949); *United States vs National City Lines*, 337 US 78 (1949).

The holding below is also in conflict with this Court's decision that when one of the inseparable parts of a civil action is transferable, 28 USC 1404a requires transfer of the entire action, even though the other part would not otherwise be transferable. *Continental Grain Co. vs Barge FBL-585*, 364 US 19 (1960).

This case is the latest in the series of cases delineating the scope and application of 28 USC 1404a;[1] and, aside from the merits of the controversy, therefore presents an important question of statutory construction for resolution by this Court.

## STATUTES INVOLVED

62 Stat. 937, 28 USC 1404a: "For the convenience of parties and witnesses, in the interest of justice, a district

[1] The latest opinions of this Court, on the scope of the Transfer of Venue Act, are *Hoffman vs Blaski*, and *Sullivan vs Behimer*, 363 US 335 (1960); *Continental Grain Co. vs Barge FBL-585*, 364 US 19 (1960).

court may transfer any civil action to any other district or division where it might have been brought."

61 Stat. 669, 9 USC 8: "If the basis of jurisdiction be a cause of action otherwise justiciable in admiralty, then, notwithstanding anything herein to the contrary, the party claiming to be aggrieved may begin his proceeding hereunder by libel and seizure of the vessel or other property of the other party according to the usual course of admiralty proceedings, and the court shall then have jurisdiction to direct the parties to proceed with the arbitration and shall retain jurisdiction to enter its decree upon the award."

## STATEMENT OF THE CASE

In August, 1959, Texas San Juan Oil Corporation (then known as Deepwater Exploration Company), owner of the drilling tender *Deepwater No. 1*, chartered the vessel and appurtenant equipment to petitioner, for use in drilling an oil well off the Louisiana coast.

After termination of the drilling, the vessel was laid up at Grand Isle, Louisiana, and was later re-delivered to Texas San Juan.

Thereafter, Texas San Juan filed the within libel in the Southern District of New York, under section 8 of the Federal Arbitration Act (9 USC 8), to compel arbitration of certain disputes arising out of the charter.

Writs of foreign attachment were issued, and sums which petitioner had on deposit in the Chase Manhattan

Bank, and which Arabian-American Oil Company owed petitioner, were attached. Petitioner appeared specially, only as claimant of the credits attached. Petitioner has not been served *in personam*.

The libelant is a Delaware corporation with an office in Dallas, Texas. It is also authorized to do business in Louisiana, but not in New York.

Petitioner is a Delaware corporation, with places of business in Oklahoma City, Oklahoma, and in New Orleans. It has no office, and is not doing business, in the Southern District of New York.

Practically all of the witnesses in this proceeding, and pertinent records, are located in or near the Eastern District of Louisiana, and not the Southern District of New York.[2]

Petitioner accordingly moved, under 28 USC 1404a, for an order transferring this proceeding, and the pendant arbitration, to the Eastern District of Louisiana for the convenience of parties and witnesses, in the interest of justice.

Judge Levet, while conceding in his opinion that petitioner's showing of convenience was not seriously disputed, denied the motion to transfer, solely on the ground that the charter provided for arbitration at New York.

[2] The sirgle affidavit filed by the libelant in opposition to the motion to transfer, does not point to one witness or record located in or near the Southern District of New York.

Thereafter, Judge Levet denied petitioner's application for certification, pursuant to the Interlocutory Appeals Act (28 USC 1292b), of the question presented by this petition.

Petitioner, being without any other means of obtaining appellate review of Judge Levet's order, then moved the Court of Appeals for leave to file petition for writs of mandamus or prohibition.

On October 30, 1961, the Court of Appeals denied the petition for writs, and petitioner is accordingly without any remedy other than that sought herein.

## ARGUMENT

### a—Certiorari Should be Granted

The application of 28 USC 1404a has been delineated in a series of decisions by this Court involving FELA cases, *in-rem* admiralty actions, forums in which the defendant could have been sued with his consent but not otherwise, declaratory-judgment proceedings, anti-trust actions, and suits in one state court to enjoin FELA actions in another.[3]

The question of applicability *vel non* of 28 USC 1404a to actions to compel arbitration, and to the arbitrations

[3] *Ex Parte Collett*, 337 US 55 (1949); *Kilpatrick vs Texas & Pacific R. Co.*, 337 US 75 (1949); *United States vs National City Lines*, 337 US 78 (1949); *Boyd vs Grand Trunk Western R. Co.*, 338 US 263 (1949); *Kerotest Mfg. Co. vs C-O-Two Co.*, 342 US 180 (1952) (dictum); *Pope vs Atlantic Coast Line R. Co.*, 345 US 379 (1953); *Norwood vs Kirkpatrick*, 349 US 29 (1955); *Hoffman vs Blaski*, and *Sullivan vs Behimer*, 363 US 335 (1960); *Continental Grain Co. vs Barge FBL-585*, 364 US 19 (1960).

themselves, is of obvious importance in light of the increasing use of arbitration clauses in labor, maritime and other types of contracts.

It is submitted that the decision below is unwarrantedly restrictive of the salutary purpose of 28 USC 1404a, and that, in any event, regardless of the merits of the holding, the issue should be set at rest definitively by this Court.

**b—This Is a "Civil Action" and May be Transferred Under 28 USC 1404a**

The Federal Transfer Act (28 USC 1404a) specifically permits transfer, for the convenience of parties and witnesses, of "any civil action" to any other district where it might have been brought.[4] 28 USC 1404a is applicable to admiralty proceedings. *Continental Grain Co. vs Barge FBL-585*, 364 US 19 (1960).

This proceeding, brought to compel arbitration, is a "civil action"—"one brought to recover some civil right, or to obtain redress for some wrong not being a crime or misdemeanor". *Black's Law Dictionary* (4th ed.) 312.

An arbitration proceeding is a "civil action", at least from the moment when a "court is first asked to participate in the proceeding, for instance, either by a motion to compel or to stay the arbitration". *Minkoff vs Scranton Frocks*, 172 FS 870, 876 (SD NY-1959).

[4] Petitioner has an office, and is doing business, in the Eastern District of Louisiana, where this proceeding might have been brought, and to which petitioner sought to have it transferred.

A "petition to compel arbitration is only the initial step in a litigation which seeks as its goal a judgment affirming the award". *Davenport vs Proctor & Gamble Manufacturing Co.*, 241 F2d 511, 514 (CA 2-1957).

"The proceeding from the outset (has) all the elements of a judicial controversy"; and the various steps in the proceeding are "not separable controversies". *Marchant vs Mead-Morrison Mfg. Co.*, 29 F2d 40, 43 (CA 2-1928), cert. den., 278 US 655.

"The entire proceeding seems to be well within the meaning of the constitutional requirement of a 'case or controversy' . . . The same reasoning should prevail in determining whether the proceeding is a 'suit' (i.e., civil action) under the Judicial Code." Note, *Enforcement of State Arbitration Laws in Federal Courts*, 42 Harv. L. Rev. 801, 802 (1929).

Under Section 8 of the Arbitration Act (9 USC 8), "the arbitration is made a phase of the suit in admiralty". *The Sydfold*, 25 FS 662, 663 (SD NY-1938). The District Court so held in overruling exceptions filed by petitioner to the libel in this case (194 FS 396, 1961 AMC 1614).

Since the suit to compel arbitration, of itself, is clearly a civil action subject to transfer, the arbitration proceeding which is an integral part of the suit, may also be transferred.

The decision below to the contrary, is in conflict with this Court's holding in *Continental Grain Co. vs Barge*

*FBL-585*, 364 US 19 (1960), that when one of the inseparable parts of a civil action is transferable, 28 USC 1404a permits, and indeed requires, transfer of the entire action, even though the other part would not otherwise be transferable.

As this Court said in *Continental Grain*, "the idea behind Sec. 1404a is that where a 'civil action' to vindicate a wrong—however brought in a court—presents issues and requires witnesses that make one District Court more convenient than another, the trial judge can, after findings, transfer the whole action to the more convenient court". 364 US at 26.

It is true that the instant charter names New York City as the place for arbitration of disputes arising thereunder, and section 4 of the Arbitration Act provides, in part, that "the hearing and proceedings, under such agreement (for arbitration), shall be within the district in which the petition for an order directing such arbitration is filed" (9 USC 4).

These, however, are mere venue provisions[5] subject, like all venue provisions, to the over-riding policy considerations of 28 USC 1404a.

In refusing to apply those considerations to the instant proceeding, the courts below acted contrary to the principle announced by this Court in *Ex parte Collett*, 337 US 55 (1949) (the "phrase ['any civil action'] is

[5] See, *e.g.*, *Continental Grain Co. vs Dant & Russell*, 118 F2d 967 (CA 9-1941), in which the court ordered the arbitration to proceed within the District of Oregon, although the agreement called for arbitration in New York.

used without qualification, without hint that some should be excluded"); *Kilpatrick vs Texas & Pacific R. Co.*, 337 US 75 (1949) (section 1404a is not limited in its application to those civil actions specified in the Venue Chapter of Title 28, but is of general application, and the phrase, "any civil action", "means what it says"); and *United States vs National City Lines*, 337 US 78 (1949) (the "unequivocal words of section 1404a and the legislative history [establish] that Congress indeed meant what it said").

**c—That the Louisiana District Is the More Convenient Forum Is Not Disputed**

Everything connected with this dispute occurred in the Gulf Coast area, largely within the Eastern District of Louisiana, and the persons involved, with scarcely any exception, reside in that district.

Libelant has failed to designate a single witness or pertinent record located in or near the Southern District of New York.

Judge Levet himself recognized that the "various reasons . . . advanced by (petitioner) showing the Louisiana District to be more convenient for the parties and witnesses", were not actually disputed.[4]

It is accordingly evident that the District Judge's refusal to order the requested transfer, was not a matter of exercise of discretion after weighing con-

[4] The libelant merely contended that "the convenience of its witnesses is none of (petitioner's) business". But see *Anthony vs RKO Radio Pictures*, 103 FS 56 (SD NY-1951).

flicting conveniences, but was predicated solely on his erroneous view of the law, that 28 USC 1404a may not be invoked in this arbitration case.[7]

**d—Issuance of Writs Is Appropriate to Compel Transfer of This Action**

Even if it could be said that the District Judge was exercising his discretion, there is ample authority for granting relief when the "district judge refuses to order a transfer, and, in doing so, 'abuses' his discretion". *Arrowhead Co. vs The Aimee Lykes*, 193 F2d 83, 84 (CA 2-1951). And see *Ford Motor Co. vs Ryan*, 182 F2d 329 (CA 2-1950); *Magnetic Engineering & Mfg. Co. vs Dings Mfg. Co.*, 178 F2d 866 (CA 2-1950).

Certainly, the refusal of the District Court to transfer this action, if viewed as an exercise of discretion, was arbitrary.

In considering petitioner's showing that both parties do business in the forum sought by petitioner, that neither does business in the forum in which the suit was brought, and that 'the Louisiana District (is) more convenient for the parties and witnesses", the District

[7] The District Judge cited, by way of analogy, *Wm. H. Muller & Co. vs Swedish American Line*, 224 F2d 806 (CA 2-1955), and other cases holding that a provision in a bill of lading, calling for exclusive jurisdiction in a foreign court, is enforceable when not unreasonable [but see *The Monrosa v. Carbon Black*, 359 U'S 180 (1959)]. But those cases involved merely the right of the court, in the absence of any statute on the subject, to decline to accept jurisdiction in deference to the designated foreign jurisdiction, and not the right of a litigant to have the venue of an action transferred to a more convenient forum within the United States, pursuant to express Congressional authorization.

Judge conceded that "the libellant does not seriously dispute these facts". But he nevertheless found "no substantial reason" to transfer the venue.

As held by the Court below in *Ford Motor Co. vs Ryan*, 182 F2d 329, 329-330 (CA 2-1950), "the order, refusing to direct the transfer, . . . (is) the kind of interlocutory order with which the court can properly deal by way of such a writ . . . (as) a sufficiently 'extraordinary cause' to empower us to do so, if the district judge . . . abused his discretion".

In the *Ryan* case, the Court stressed the problem presented in reverse here: "Were the case transferred, many witnesses residing in New York could not be compelled to testify in open court, as they can be if the case is not transferred". 182 F2d at 331.

The transfer was accordingly denied in *Ryan*; in the present case, for the same reason, it should be granted.

While the Federal Arbitration Act confers upon the arbitrators, the right to summon witnesses, that right is subject to the same limitations as "subpoenas to appear and testify before the court" (9 USC 7), and therefore can extend only within the district, or to 100 miles from the place of the hearing. Rule 32D(e), General Admiralty Rules, as amended, adopted April 17, 1961; FRCP 45(e).

It is apparent that to assure personal attendance before the arbitrators of necessary witnesses, most of whom are not employees of any of the parties, the

proceeding should be conducted in the Eastern District of Louisiana.

Even the District Court itself, sitting in New York, cannot force the witnesses, resident in or near Louisiana, to appear in New York, under the limitations imposed by Rule 32D(e) of the present General Admiralty Rules.

Further, the arbitrators, under the Commercial Arbitration Rules, or such other rules as they may adopt, are not bound to receive depositions. In fact, Section 28 of the Commercial Arbitration Rules specifically provides that the parties "shall . . . present . . . witnesses", and does not provide for depositions.

This puts both parties to the necessity of persuading the witnesses to appear before the arbitrators in New York. It also means that if successful in persuading persons not in their employ to come to New York, the parties will be put to considerable travel and allied expense.

This Court, in *Los Angeles Brush Corporation vs James*, 272 US 701, 707 (1927), recognized the power to direct mandamus to a district court which has put a party to unwarranted expense: "One of the causes for complaint of the general administration of justice is the expense it entails upon the litigants; and, so far as it reasonably may do so, this Court is anxious to minimize the basis for such complaints". See also *McCullough vs Cosgrave*, 309 US 634 (1940).

Further, "it will be extremely difficult . . . to show that (petitioner) lost the case because of the handicap of the (denial of) transfer. As for the added cost of trying the case in the (objectionable) forum, it is hard to see how in any event it could be recoverable . . . for the error would be that of the court. There are therefore at least plausible grounds why (the Court) should issue the writ." *Magnetic Engineering & Mfg. Co. vs Dings Mfg. Co.*, 178 F2d 866, 869 (CA 2-1950).

It is beyond question that a dispute between two corporations, neither of which is doing business in New York, but both of which are doing business in the Eastern District of Louisiana, arising out of a problem—unique to, and well understood in, Louisiana—of operation and maintenance of an off-shore drilling tender, and involving witnesses and experts resident therein, and records located there, can best be handled in the Eastern District of Louisiana.[8]

## CONCLUSION

For the foregoing reasons:

1—This petition for a writ of *certiorari* should be granted; and petitioner further prays that:

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[8] For the same reasons, the court in *Chemical Carriers vs L. Smit & Co.'s. Internationale S.*, 154 FS 886 (SD NY-1957)—one of the cases cited by the district judge, by way of analogy—refused to sustain a provision in a bill of lading designating the jurisdiction for adjudication of disputes thereunder. In determining whether such a provision may be sustained, *forum non conveniens* criteria are applied. *Cf. Wm. H. Muller & Co. vs Swedish American Line*, 224 F2d 806, 808 (CA 2-1955).

2—A writ of mandamus or prohibition issue from this Court, directed to the Honorable Richard A. Levet, Judge of the United States Disrict Court for the Southern District of New York, to show cause on a day to be fixed by this Court, why mandamus or prohibition should not issue from this Court, directing him to vacate his order entered on September 8, 1961, denying petitioner's motion for transfer, and to enter an appropriate order transferring this action, and the pendant arbitration, to the United States District Court for the Eastern District of Louisiana, New Orleans Division; and that

3—Petitioner have such additional relief and process as may be necessary and appropriate in the premises.

*Eberhard P. Deutsch,*
Attorney for Petitioner.

*Deutsch, Kerrigan & Stiles,*
*Malcolm W. Monroe,*
*Burlingham, Underwood, Barron,*
*Wright and White.*
*Eugene Underwood.*
Of Counsel

November 29, 1961

## APPENDIX

### District Court's Memorandum and Order

LEVET, D. J.

The defendant appears specially and moves to transfer this action and the arbitration proceeding which is a phase of this action to the Eastern District of Louisiana, New Orleans Division, for the convenience of the parties and witnesses, pursuant to the provisions of Title 28 USC §1404(a), which is as follows:

> "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

The libellant is in effect the successor to another corporation, Deepwater Exploration Company, which executed a bareboat charter of the latter's drilling tender, "Deepwater No. 1."

The libellant is a Delaware corporation with an office in Dallas, Texas, and is authorized to do and is doing business in the Eastern District of Louisiana, but not in the Southern District of New York.

Respondent is a Delaware corporation, with offices and places of business in Oklahoma City and in New Orleans, it has no office and is not doing business in the Southern District of New York.

Various reasons are advanced by respondent showing the Louisiana District to be more convenient for the parties and witnesses.

The libellant does not seriously dispute these facts, but, at least as to its witnesses, curtly states in its brief that while "libelant appreciates respondent's concern lest libelant be inconvenienced, libelant submits that the convenience of its witnesses is none of respondent's business."

The libellant points out that respondent by the charter party agreed to arbitrate at New York. Paragraphs 22 and 23 of this agreement are as follows:

> "22. *Applicable Law.* This Bareboat Charter Party shall be deemed to be a New York contract and shall be construed and enforced in accordance with the admiralty law of the United States and, to the extent applicable, the law of the State of New York."

> "23. *Arbitration.* Should any dispute arise under this Bareboat Charter Party, the matter in dispute shall be referred to three persons at New York, one to be appointed by Owner, one by Charterer and the third by the two so chosen, or in default thereof, by a court of competent jurisdiction: and their decision or that of any two of them shall be final, and their award may be made a rule of court and a judgment or decree entered thereon. The Charterer and the Owner each shall bear one-half of the fees and expenses of the arbitrators."

The primary question then is whether Section 1404(a) applies here in an action to enforce arbitration and to the place where the arbitration is conducted.

Obviously, the transfer of this action to another district does not of itself affect the arbitration or alter the place where such arbitration is to be held unless the transfer itself or the transferee court requires the arbitration to proceed in such district. What respondent is seeking is a direction to the arbitrators as to the place where they hold their hearings or a transfer which in and of itself might produce the same result. However, there appears to be no substantial reason why the respondent should be relieved from its contractual obligations.

There is pertinent analogy between the arbitration clause in question and provisions, for example, in bills of lading providing that all controversies under the bill of lading shall be determined under the jurisdiction of the court of carrier's country. These provisions, if not unreasonable, are sustained. See *Wm. H. Muller & Co. v. Swedish American Line Ltd.*, 2 Cir., 1955, 224 F. 2d 806, cert. denied, 1955, 350 U. S. 903. See also *Krenger v. Pennsylvania R. Co.*, 2 Cir., 1949, 174 F. 2d 556. Cf. *Chemical Carriers v. L. Smit & Co.'s Internationale S.*, D. C. S. D. N. Y., 1957, 154 F. Supp. 886; *Sociedade Brasileira, etc. v. S.S. Punta Del Este*, D. C. D. N. J., 1955, 135 F. Supp. 394.

In my opinion, no substantial reason exists to deny the enforcement of the arbitration forum chosen by the parties.

Accordingly, the motion is denied.

So ordered.

Dated: New York, N. Y.

September 7, 1961.

RICHARD H. LEVET
*United States District Judge*

(Entered September 8, 1961)

**Court of Appeals' Order**

A petition for a writ of mandamus and/or prohibition having been filed herein by counsel for the petitioner and argument having been had thereon,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

(Rendered October 30, 1961)

**Memorandum as to Record**

The following parts of the records below are included in the certified transcript filed herein with the petition for certiorari, and are therefore not reproduced herein:

Libel; Notice of Special Appearance; Motion to Transfer; Supporting Affidavit; Affidavit in Behalf of Libelant;

Application under Interlocutory Appeals Act; Order Denying Application for Certification; Motion for Leave to File Petition for Writs; Petition to Court of Appeals for Writs of Prohibition or Mandamus.

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# Supreme Court of the United States

OCTOBER TERM, 1961

No. 581

AN-SON OFFSHORE DRILLING COMPANY,
Petitioner,

*against*

HONORABLE RICHARD H. LEVET, UNITED STATES DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF NEW YORK,
Respondent.

No. 778 Misc.

AN-SON OFFSHORE DRILLING COMPANY,
Petitioner,

*against*

HONORABLE RICHARD H. LEVET, UNITED STATES DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF NEW YORK,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SECOND CIRCUIT

*and*

PETITION FOR A WRIT OF MANDAMUS OR PROHIBITION

## TEXAS SAN JUAN OIL CORPORATION'S BRIEF IN OPPOSITION

EDWARD C. KALAIDJIAN,
40 Wall Street,
New York 5, New York,
Attorney for Texas San Juan Oil Corporation

THACHER, PROFFITT, PRIZER, CRAWLEY & WOOD,
Of Counsel.

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# Supreme Court of the United States

OCTOBER TERM, 1961

No. 581

AN-SON OFFSHORE DRILLING COMPANY,

Petitioner,

*against*

HONORABLE RICHARD H. LEVET, UNITED STATES DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF NEW YORK,

Respondent.

No. 778 Misc.

AN-SON OFFSHORE DRILLING COMPANY,

Petitioner,

*against*

HONORABLE RICHARD H. LEVET, UNITED STATES DISTRICT JUDGE FOR THE SOUTHERN DISTRICT OF NEW YORK,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SECOND CIRCUIT

*and*

PETITION FOR A WRIT OF MANDAMUS OR PROHIBITION

## TEXAS SAN JUAN OIL CORPORATION'S BRIEF IN OPPOSITION

### Opinions Below and Jurisdiction

The opinions of the district court denying petitioner's transfer motion and denying petitioner's application for

relief under the Interlocutory Appeals Act (28 U.S.C. § 1292(b)) are reported at 198 F. Supp. 284. The Court of Appeals rendered its order without written opinion on October 30, 1961.

This court has jurisdiction pursuant to 28 U.S.C. § 1254 and § 1651.

## Question Presented

The question presented for review may be more appropriately stated:

> Was the district court free to decide, in the circumstances presented, that no substantial reason existed for relieving the petitioner from its contractual obligation to arbitrate at the location stipulated in the charter party; or, did the federal venue statute, 28 U.S.C. §1404(a), compel the district court to transfer the arbitration of charter disputes from the place stipulated in the arbitration agreement to a different location on grounds of convenience?

As the transfer of venue pursuant to 28 U.S.C. § 1404(a) is discretionary, the writs which the petitioner seeks are scarcely an appropriate remedy.

The district court's denial of petitioner's motion for a transfer of this arbitration proceeding from the contractual forum at New York to an asserted forum of convenience at New Orleans and the subsequent concurrence therein by the United States Court of Appeals for the Second Circuit in denying petitioner's application for Writs of Mandamus or Prohibition do not conflict with any principles enunciated by this court in *Ex parte Collett*, 337 U. S. 55 (1949); *Kilpatrick* v. *Texas and Pacific R. Co.*, 337 U. S. 75 (1949); and *United States* v. *National City Lines*, 337 U. S. 78 (1949).

Those were civil actions in which venue was determined by statute or by the happenstance of the plaintiff's ability to find the defendant in the jurisdiction where suit was commenced. Unlike civil actions of that kind, arbitration may be had only by the consent of the parties and the location of the prospective arbitration is an important consideration in the granting or withholding of that consent. Consequently, the location of this arbitration proceeding is not merely a matter of venue but rather, is a substantial contract right for which the parties consciously bargained when entering into the charter.

This court has pointed out in *Bernhardt* v. *Polygraphic Co.*, 350 U. S. 198 (1956) and *Wilko* v. *Swan*, 346 U. S. 427 (1953), that commercial arbitration affords some advantages and is fraught with some risks which are not inherent in a civil action. The differences mentioned in those opinions prompted libelant to demand New York as the place of arbitration as one of the conditions for the chartering of its vessel to petitioner.

In denying petitioner's application for relief under the Interlocutory Appeals Act (28 U.S.C. § 1292(b)), the District Court correctly stated that "the question at issue does not involve any controlling principle of law." Petitioner's persistent efforts to obtain relief pursuant to the All Writs Act have already unduly delayed consideration of the disputes on their merits.

## Statement of the Case

Texas San Juan Oil Corporation, libelant* here, filed its libel in the district court on March 29, 1961 for arbitration of certain disputes which had arisen under a written bareboat charter party with petitioner dated August 12, 1959. The suit was predicated upon the United States

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* district court designation will be used throughout.

Arbitration Act, 9 U.S.C. §1 *et seq.*, and the provisions of the charter party.

By the terms of the bareboat charter party libelant let to petitioner the offshore drilling tender *Deepwater No. 1* for petitioner's use in the drilling of one or more oil wells off the coast of Louisiana. The pertinent provisions of the charter party are:

> "22. *Applicable Law.* This Bareboat Charter Party shall be deemed to be a New York contract and shall be construed and enforced in accordance with the admiralty law of the United States and, to the extent applicable, the law of the State of New York.
>
> 23. *Arbitration.* Should any dispute arise under this Bareboat Charter Party, the matter in dispute shall be referred to three persons at New York, one to be appointed by Owner, one by Charterer and the third by the two so chosen, or in default thereof, by a court of competent jurisdiction; and their decision or that of any two of them shall be final, and their award may be made a rule of court and a judgment or decree entered thereon. The Charterer and the Owner each shall bear one-half of the fees and expenses of the arbitrators."

When the parties contracted for arbitration of disputes at New York and for the construction of their contract in accordance with the admiralty law of the United States and the applicable New York law, petitioner knew:

1. that the *Deepwater No. 1* was being fitted out at a Texas shipyard to perform the charter;
2. that petitioner intended to employ the vessel for drilling in the Gulf of Mexico;
3. that petitioner would crew the vessel from that area, and

4. that upon completion of the charter, the necessary repairs to the vessel would be performed in a Gulf Coast yard.

With full knowledge of these facts, petitioner consented to arbitrate disputes at New York. Now that disputes have arisen, petitioner seeks to be relieved of its contract by resorting to the federal venue statute, 28 U.S.C. § 1404(a).

Petitioner applied to the district court for a change of venue from the Southern District of New York to the Eastern District of Louisiana. The basis of petitioner's application was the convenience of witnesses, libelant's as well as petitioner's. In a memorandum decision and order dated September 7, 1961, the district court (Levet, J.) denied petitioner's application on the grounds that petitioner had shown no substantial reason why it should be relieved of its contractual undertaking to arbitrate at New York. Petitioner then applied to the court to certify its decision for interlocutory appeal pursuant to the provisions of 28 U.S.C. § 1292(b). That application was denied by the court in a written memorandum dated September 21, 1961.

The district court's denial of the petitioner's transfer motion and the Court of Appeals' denial of petitioner's application for Writs of Mandamus or Prohibition have had no more drastic effect than to subject the petitioner to arbitration at the location stipulated in petitioner's contract with libelant.

## ARGUMENT

### 1. The All Writs Act affords petitioner no remedy.

The All Writs Act (28 U.S.C. § 1651) was not intended as a vehicle for the judicial review of interlocutory, discretionary orders, not otherwise reviewable.

Most nearly pertinent is the decision of this court in *Bankers Life & Casualty Co.* v. *Holland*, 346 U. S. 379 (1953), holding that mandamus is not a proper remedy to vacate a severance and transfer order entered by a district court on the ground of improper venue under 28 U.S.C. § 1406(a). In its decision the court reiterated that the extraordinary writs may not be employed as substitutes for appeals even though the order sought to be vacated might be a cause of inconvenience or hardship. If the district court and the Court of Appeals had erred in their denial of the relief which petitioner sought, and they did not, the asserted error would not justify the issuance of an extraordinary writ at petitioner's behest.

*Parr* v. *United States*, 351 U. S. 513 (1956).

This court has stated in *Bankers Life & Casualty Co.* v. *Holland*, 346 U. S. 379 at pages 382-383, that the use of the extraordinary writs is limited to cases of "usurpation of judicial power", typified by *DeBeers Consolidated Mines* v. *United States*, 325 U. S. 212 (1945), to cases involving the abuse of judicial power and to cases where a court has exceeded or refused to exercise its jurisdiction.

*LaBuy* v. *Howes Leather Co.*, 352 U. S. 249 (1957);
*Parr* v. *United States*, 351 U. S. 513 (1956);
*Roche* v. *Evaporated Milk Association*, 319 U. S. 21 (1943).

A careful reading of the decisions in *Arrowhead Co.* v. *The Aimee Lykes*, 2 Cir., 193 F. 2d 83, 84 (1951); *Ford Motor Co.* v. *Ryan*, 2 Cir., 182 F. 2d 329 (1950), and *Magnetic Engineering & Manufacturing Co.* v. *Dings Manufacturing Co.*, 2 Cir., 178 F. 2d 866 (1950), cited at page 12 of the petition herein, discloses that the United States Court of Appeals for the Second Circuit does not counte-

nance the charitable use of the extraordinary writs which the petitioner expounds.

> *Lykes Bros. Steamship Co.* v. *Sugarman*, 2 Cir., 272 F. 2d 679 (1959).

Petitioner failed to meet its burden of establishing a "clear and indisputable" case for relief under the All Writs Act.

> *Bankers Life & Casualty Co.* v. *Holland*, 346 U. S. 379, 384-385.

Petitioner's posture before this court is accurately characterized by the decision of the United States Court of Appeals for the Third Circuit in *All States Freight* v. *Modarelli*, 3 Cir., 196 F. 2d 1010, at page 1012:

> "Every litigant against whom the transfer issue is decided naturally thinks the judge was wrong. It is likely that in some cases an appellate court would think so, too. But the risk of a party being injured either by the granting or refusal of a transfer order is, we think, much less than the certainty of harm through delay and additional expense if these orders are to be subjected to interlocutory review by mandamus."

Petitioner's persistent attempts to obtain relief pursuant to the All Writs Act (28 U.S.C. § 1651), to which it is not entitled, have already delayed the parties a number of months in getting to the merits of the charter disputes between them and have occasioned unnecessary expense.

## 2. The location of this arbitration proceeding is not transferable.

Implicit in argument (b) at page 8 of the petition is the syllogism:

> Any proceeding of a non-criminal nature is a civil action transferable pursuant to 28 U.S.C. § 1404(a);

> arbitrations are non-criminal in nature; ergo, arbitrations must be transferable as any other civil action.

Petitioner's syllogism is a blooming example of the fallacy of the undistributed middle term. Characterizing an arbitration proceeding as a "civil action", as petitioner has done in reliance on *Marchant* v. *Mead-Morrison Manufacturing Co.*, 2 Cir., 29 F. 2d 40 (1928), does not contribute to the resolution of the problem. As Judge Medina has said in *Robert Lawrence Company* v. *Devonshire Fabrics, Inc.*, 2 Cir., 271 F. 2d 402 (1959), at pages 407-408:

> "Mere catchwords, labels and cliches no longer smooth the path of justice as they so often did in the past. As noted above, arbitration has often been described as pertaining to the law of remedies, but this tendency is losing much of its fascination in these modern times."

The concept, implicit in petitioner's argument, that arbitration is merely a form of trial to be used in lieu of a trial at law, typified by such decisions as *Murray Oil Products Co.* v. *Mitsui & Co.*, 2 Cir., 146 F. 2d 381 (1944), and *American Locomotive Co.* v. *Chemical Research Corporation*, 6 Cir., 171 F. 2d 115 (1949), has been rejected by this court in *Bernhardt* v. *Polygraphic Co.*, 350 U. S. 198 (1956), at pp. 202-203, and *Wilko* v. *Swan*, 346 U. S. 427 (1953), at pp. 435-438. These decisions instruct that arbitration may not be passed off simply as the equivalent of a judicial reference but has its own distinguishing features peculiar to its function as an implement for the resolution of commercial disputes. Thus arbitrators are without judicial instruction on the law. They need make no explanation of the reasons for their decision, nor are they required to keep a complete record of their proceedings. Their decisions need not take into account such well defined judicial standards as "burden of proof," "reasonable care" or "material fact." The scope of review of their decisions is most limited. There is at least some

authority that the Federal Rules of Civil Procedure providing for discovery in "civil actions" have no applicability to arbitrations.

> *Foremost Yarn Mills, Inc.* v. *Rose Mills, Inc.* (E. D., Pa.), 25 F.R.D. 9 (1960);
> *Commercial Solvents Corp.* v. *Louisiana Liquid F. Co.* (S. D., N. Y.), 20 F.R.D. 359 (1957).

These enumerated differences between the garden variety civil action and an arbitration proceeding unquestionably explain the most fundamental of all distinctions between them, i.e., that arbitration may be had only by the consent of the parties.

Mindful of these essential differences and the risks and advantages which they entailed, libelant contracted with petitioner for the arbitration of charter disputes at New York as a condition to petitioner's hiring of its vessel. As New York is a leading center for arbitration and maritime law, libelant deemed that arbitration of disputes here would minimize the risks inherent in the procedure.

Petitioner's consent to arbitrate disputes with libelant at New York was valid and irrevocable except upon the grounds specified in the Arbitration Act, 9 U.S.C. § 2. The convenience of witnesses does not relieve petitioner from its contract under the Federal Arbitration Act or the New York Arbitration Law. C.P.A. § 1448.

As to the enforceability of a stipulation to arbitrate at a definite place, some guidance may be derived from the decision of New York Court of Appeals in *Matter of Amtorg Trading Corporation* (*Camden Fibre Mills*), 304 N. Y. 519 (1952). The court declined to relieve an American corporation of a commercial contract stipulation providing for arbitration in Moscow. At page 521 of its opinion, the Court of Appeals stated:

> "We also agree with the Appellate Division's disposition of the remaining issues. Camden chose to

do business with Amtorg and to accept, as one of the conditions imposed, arbitration in Russia; it may not now ask the courts to relieve it of the contractual obligation it assumed."

The United States Court of Appeals for the Second Circuit recently upheld the enforceability of a contractual stipulation as to the venue of an action on a bill of lading in *William H. Muller & Co.* v. *Swedish American Line, Ltd.*, 2 Cir., 224 F. 2d 806 (1955).

The case of *Continental Grain Co.* v. *Dant & Russell*, 9 Cir., 118 F. 2d 967 (1960), cited at footnote 5 of petitioner's brief is not authority for applying the federal venue statute to arbitration proceedings. Although the charter in that case stipulated the arbitration of disputes in New York, the libelant petitioned the court in Oregon for arbitration pursuant to § 4 of the Federal Arbitration Act which specifies that arbitrations must proceed in the district where the petition for arbitration is filed. The *Continental Grain* case may be explained as a waiver by the libelant in bringing suit elsewhere. No waiver exists in this case.

Petitioner's venue application also offends the principle in arbitration that once a contract to arbitrate has been established, all issues in the proceeding are for the arbitrator.

*Matter of Exercycle Corp.* (*Maratta*), 9 N. Y. 2d 329 (1961).

". . . The role of the court on a motion to compel or stay arbitration is always cropping up in commercial arbitration cases. It has repeatedly been held that a court faced with such an application is not concerned with the merits of the dispute itself, but that only three questions are before it: Whether there is a written contract to arbitrate, whether the dispute between the parties is covered by the arbitration

clause, and whether there was a failure to proceed with the obligation to arbitrate. Every other issue in the proceeding is for the arbitrator." 36 New York University L. R. 545, 556-557.

The decision in *Foremost Yarn Mills, Inc.* v. *Rose Mills, Inc.* (E. D., Pa.), 25 F.R.D. 9 (1960), suggests that the power of the courts to regulate arbitrations is limited to those contained in specific sections of the Arbitration Act. If, as the court there concluded, the Arbitration Act does not regulate the procedures before the arbitrators or prescribe rules or regulations for the conduct of hearings before arbitrators, it may be safely assumed that the federal venue statute, 28 U.S.C. § 1404(a) was never intended to be engrafted upon arbitration proceedings. If the court holds that arbitrations may be transferred away from their agreed location on grounds of convenience, it will introduce the mischief of "forum shopping" into a system which was conceived for the expeditious and inexpensive resolution of commercial disputes, thereby impairing its efficacy.

The case of *Continental Grain Co.* v. *Barge FBL-585*, 364 U. S. 19 (1960), cited by petitioner at page 13 of its brief is inapposite. The court was not concerned with an arbitration at all; nor was there any question of the transferability of a civil action away from a place where the parties had agreed to conduct it. The decision was a logical means of avoiding separate trials by two different courts of the same issues.

Libelant regards the agreed location of this arbitration at New York as a contract right of the kind mentioned by Judge Dimock in *Schilling* v. *Canadian Foreign Steamship Company*, 190 F. Supp. 462 (1961), at page 463:

> "The right of a party to a contract to resort to arbitration provided for in that contract is as much a contract right as is the right to payment. . . ."

## CONCLUSION

**The petitions for a writ of certiorari and for a writ of mandamus or prohibition should be denied.**

EDWARD C. KALAIDJIAN,
Attorney for
Texas San Juan Oil Corporation.

THACHER, PROFFITT, PRIZER,
CRAWLEY & WOOD,
Of Counsel.

December 27, 1961.